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No. 91-163

In The

Supreme Court of the United States

October Term, 1991

MATTHEW B. GOODALL, *et al.*,

Petitioners,

v.

THE STAFFORD COUNTY SCHOOL BOARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did Petitioners have a right under state or federal law to have Matthew Goodall receive a cued speech interpreter at public expense where the School Board had offered to provide those services to Matthew in the public schools, but the Goodalls rejected that offer because they wanted their son to go to a pervasively religious school?

2. Does the School Board's refusal to subsidize Matthew's religious education burden the Goodalls' First Amendment rights?

3. Would the School Board violate the Establishment Clause of the First Amendment if it provided a publicly sponsored cued speech interpreter in a pervasively religious school?

4. Is the School Board's refusal to provide a publicly sponsored interpreter for Matthew in a pervasively religious school justified by a compelling state interest?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

OPINIONS AND ORDERS BELOW 3

JURISDICTION 3

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

I. THE COURT SHOULD DENY THE PETITION BECAUSE FEDERAL LAW DOES NOT REQUIRE THE SCHOOL BOARD TO PROVIDE A CUED SPEECH INTERPRETER TO MATTHEW AT A PRIVATE SCHOOL 7

II. THE PETITION SHOULD BE DENIED BECAUSE FEDERAL REGULATIONS PROHIBIT THE USE OF IDEA FUNDS FOR SERVICES AT A RELIGIOUS SCHOOL 16

III. THE PETITION SHOULD BE DENIED BECAUSE VIRGINIA LAW PROHIBITS THE USE OF PUBLIC FUNDS FOR SERVICES AT FREDERICKSBURG CHRISTIAN SCHOOL 17

IV. THE PETITION SHOULD BE DENIED BECAUSE THE REFUSAL TO SUBSIDIZE THE GOODALLS' RELIGIOUS BELIEFS DOES NOT RAISE A FIRST AMENDMENT QUESTION 19

TABLE OF CONTENTS – Continued

Page

V. THE PETITION SHOULD BE DENIED BECAUSE THE FREE EXERCISE CLAUSE DOES NOT REQUIRE THE SCHOOL BOARD TO ASSIST MATTHEW GOODALL IN HIS RELIGIOUS STUDIES..... 23

VI. THE PETITION SHOULD BE DENIED BECAUSE THE SCHOOL BOARD WOULD VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT IF IT PROVIDED A CUED SPEECH INTERPRETER AT FREDERICKSBURG CHRISTIAN SCHOOL 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Aguilar v. Felton, 473 U.S. 402 (1985) 29

Barnett v. Fairfax County School Board, 721 F. Supp. 757 (E.D. Va. 1989), *aff'd*, 927 F.2d 146 (4th Cir. 1991) 13

Board of Education v. Rowley, 458 U.S. 176 (1981) 7

Board of Education of the Monroe-Woodbury Central School District v. Wieder, 72 N.Y.2d 174, 531 N.Y.S.2d 889, 527 N.E.2d 767 (N.Y. 1988) 16

Board of Supervisors v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975) 18

Bowen v. Kendrick, 487 U.S. 589 (1988) 27

Braunfeld v. Brown, 366 U.S. 599 (1961) 20

Cammarano v. United States, 358 U.S. 498 (1959) 22

Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115 (1956) 20

Grigg v. Commonwealth, 224 Va. 356, 297 S.E.2d 799 (1982) 18

Harris v. McRae, 448 U.S. 297 (1980) 22

Hunt v. McNair, 413 U.S. 734 (1973) 27

Langlotz v. Picciano, 683 F. Supp. 1041 (E.D. Va. 1988), *aff'd*, 905 F.2d 1530 (4th Cir. 1990) 23

Lemon v. Kurtzman, 403 U.S. 602 (1971) 24, 25, 28

Maher v. Roe, 432 U.S. 464 (1977) 21

TABLE OF AUTHORITIES – Continued

Page

McNair v. Cardimone, 676 F. Supp. 1361 (S.D. Ohio 1987), *aff'd*, 872 F.2d 153 (6th Cir. 1989) 7, 9, 11

Meek v. Pittenger, 421 U.S. 349 (1975) 26, 27, 28, 29

Parents' Association of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir. 1986) 24

Posey v. Commonwealth, 123 Va. 551, 96 S.E. 771 (1918) 19

Regan v. Taxation With Representation, 461 U.S. 540 (1983) 21

Rust v. Sullivan, ___ U.S. ___, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991) 21

Schimmel by Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987) 17, 18

School Board v. Giannoutsos, 238 Va. 144, 380 S.E.2d 647 (1989) 18

School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373 (1985) 24, 25, 26, 27

Smith v. County of Albemarle, 895 F.2d 953 (4th Cir. 1990) 23

Walker v. Temple, 130 Va. 567, 107 S.E. 720 (1921) 19

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 21

Work v. McKenzie, 661 F. Supp. 225 (D.D.C. 1987) .. 7, 8, 9

Zobrest v. Catalina Foothills, 1988-89 EHLR 441:564 (D. Ariz., July 19, 1989) 27

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

First Amendment to the Constitution of the United States ..... *passim*

Va. Const. Article I, § 16 23

Va. Const. Article VIII, § 10 18

20 U.S.C. § 1400, *et seq.* 1

20 U.S.C. § 1401(18) 7

20 U.S.C. § 1412(1) 7

20 U.S.C. § 1413(a)(4)(B) 8, 17

P.L. 100-259, 20 U.S.C. § 1681, *et seq.* 30

Va. Code §§ 22.1 - 213 – 222 ..... 17, 18, 19

34 C.F.R. § 300.400 11

34 C.F.R. § 300.401(a)(3) 17

34 C.F.R. § 300.402 11

34 C.F.R. § 300.403 10

34 C.F.R. § 300.450 11

34 C.F.R. § 300.452 11

34 C.F.R. § 76.532(a)(1) 17

34 C.F.R. § 76.651(a)(1) 13

34 C.F.R. § 76.654 12

34 C.F.R. § 76.659 12

TABLE OF AUTHORITIES – Continued

Page

OTHER

16 Am. Jur. 2d, *Constitutional Law* §§ 160, 172 (1979) 20

16 EHLR 1398 (1990) 14

1979 EHLR 211:110 15

1985-86 EHLR 507:327 15

1988-89 EHLR 441:564 27

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RESPONDENT'S BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Petitioners Matthew Goodall, Robert Goodall and Kathleen Goodall ("the Goodalls") filed this action under the Education of the Handicapped Act ("EHA"), now called the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, seeking to compel the Stafford County School Board ("the School Board") to provide, at public expense, a cued speech interpreter for Matthew Goodall ("Matthew") at a private religious school, The Fredericksburg Christian School.

The district court granted summary judgment for the School Board based on four undisputed facts:

1. The School Board has offered to provide a cued speech interpreter to Matthew at a public school in Stafford County and stands ready to do so.

2. The Goodalls rejected that offer because they wanted their son to go to Fredericksburg Christian School specifically to receive religious instruction.

3. Fredericksburg Christian School is a pervasively religious school in which Bible classes are taught, Christian teachings are woven into the curriculum, and spoken prayer is taught every day.

4. A cued speech interpreter would be in the class with Matthew 100% of the time and interpret everything that was said, converting it from the spoken word into cued sign language. This would include religious teachings and prayers. (Pet. App. 87-88).

These four undisputed facts establish that the Goodalls have no right to have a publicly sponsored cued speech interpreter provided to Matthew in a pervasively religious school. Neither state nor federal law requires, or permits, provision of such services at public expense in a private school, whether religious or secular. Furthermore, the First Amendment to the United States Constitution clearly prohibits the School Board from providing a publicly sponsored interpreter in a pervasively religious school such as Fredericksburg Christian School.

This case presents no issues appropriate for review, and Respondent prays that the Petition for Writ of Certiorari be denied. The decision of the Court of Appeals does not conflict with any decision of another court, and

the issues decided in this case have been considered and dealt with in the same way by other courts.

OPINIONS AND ORDERS BELOW

Respondent accepts Petitioners' statement of the applicable opinions and orders below.

JURISDICTION

The Petitioners claim that jurisdiction lies under 28 U.S.C. § 1254. However, Petitioners have failed to identify any of the grounds for which Certiorari may be granted, as set forth in Rule 10 of the Rules of this Court.

STATEMENT OF THE CASE

As indicated by the Goodalls' Petition, there are no genuine disputes as to any material facts, particularly the four material facts mentioned above. However, because the Goodalls' description of the background of this case is somewhat confusing, the School Board restates the factual background.

The School Board provides public education services in Stafford County, Virginia, including special education and related services as required by federal and Virginia law.

Matthew Goodall is a minor and has been a resident of Stafford County since his birth. (App. 2). Robert B.

Goodall and Kathleen N. Goodall are Matthew's parents. Matthew became profoundly hearing impaired after an attack of meningitis at age 3 1/2. (*Id.* at 3). Shortly thereafter, he was identified as a handicapped child for whom special education services were appropriate. (*Id.*).

In 1980, 1981, 1982 and 1983, Individualized Educational Plans (IEPs) were prepared for Matthew, with the consultation and concurrence of Matthew's parents, calling for special education and related services to be provided at Spotswood Elementary School, a public school. (*Id.*). Matthew attended a preschool class in the regional special education program at Spotswood Elementary School along with several other deaf children. Matthew continued to participate in this program through the First Grade. (*Id.*).

In 1984, Matthew's parents voluntarily placed Matthew at The Word of Life School, a private religious school in Fredericksburg, Virginia, which he attended through the Fourth Grade. In 1986, Matthew's parents voluntarily placed Matthew in the Stafford Christian School, a private religious school in Stafford, for the Fifth and Sixth Grades. (*Id.* at 4).

In 1988, Matthew's parents decided that he should attend Fredericksburg Christian School, a private religious school, to further his religious education and development. (*Id.*). Fredericksburg Christian School is a religious school, in which Christian teachings are woven into the curriculum together with non-religious subjects. The curriculum includes Biblical education and spoken prayer as one of the daily activities. Matthew receives no

special education at Fredericksburg Christian School. (*Id.* at 5).

In the summer of 1988, the Goodalls requested that the Stafford County Public Schools again provide special education services to Matthew. An IEP meeting was held in September of 1988. The Goodalls participated in this meeting and a draft IEP was prepared. The draft IEP indicated that hearing-related services were still appropriate for Matthew and proposed to provide those services at the Drew Middle School, a Stafford County public school. (*Id.*).

Matthew's parents objected to Matthew's receiving interpretive services at Drew Middle School and asked the School Board to provide a full-time cued speech interpreter at Fredericksburg Christian School. The Goodalls wanted the School Board to provide a cued speech interpreter to be present, full-time, in Matthew's classroom at Fredericksburg Christian School. The interpreter's job would be to interpret the sounds in the classroom into physical representations that Matthew could understand. Thus, the interpreter would be present during Matthew's religious instruction and would interpret that religious instruction for Matthew's understanding. (*Id.* at 6).

The School Board denied the Goodalls' request but offered to provide a cued speech interpreter to Matthew at a public school in Stafford County (and it stands ready to do so today). The Goodalls requested a due process hearing to challenge the School Board's position. The state Hearing Officer ruled that the School Board was not responsible for providing a cued speech interpreter to Matthew, since he was unilaterally placed in a private

school by his parents for personal reasons. The Hearing Officer further held that for the School Board to provide a cued speech interpreter at Fredericksburg Christian School with public funds would violate the Establishment Clause of the First Amendment. (*Id.* at 7).

The Goodalls appealed the Hearing Officer's decision to the Virginia Department of Education. The state Review Officer's decision of September 9, 1989 affirmed the decision of the Hearing Officer, specifically holding that the requested action would violate the Establishment Clause. (*Id.* at 8).

The Goodalls filed this action on October 10, 1989, seeking an order directing the School Board to provide a cued speech interpreter for Matthew Goodall at Fredericksburg Christian School and seeking reimbursement for their costs incurred in providing such an interpreter to Matthew. The District Court dismissed their Complaint. The Court of Appeals affirmed, and the Goodalls filed their Petition with this Court.

REASONS FOR DENYING THE WRIT

Although Petitioners question the Court of Appeals' rulings on issues of state, federal, and constitutional law, the Petition does not identify any way in which this case satisfies the criteria specified in Rule 10 for review by this Court. There is no allegation that the Court of Appeals' decision is in conflict with the decision of any other court. Nor does the Petition identify any important questions of law which have not been, but which should be, settled by this Court. Instead, the Petition reveals that the Goodalls

are simply dissatisfied with the decisions reached by the state Hearing Officers, the District Court and the Court of Appeals for the Fourth Circuit. The decisions of these courts were correct and need not be reviewed by this Court.

I. THE COURT SHOULD DENY THE PETITION BECAUSE FEDERAL LAW DOES NOT REQUIRE THE SCHOOL BOARD TO PROVIDE A CUED SPEECH INTERPRETER TO MATTHEW AT A PRIVATE SCHOOL.

The IDEA gives financial assistance to participating states for the education of handicapped children. To qualify for these funds, a participating state must have in effect "a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). *See generally Board of Educ. v. Rowley*, 458 U.S. 176, 179-84 (1981). The "free appropriate public education" required by the IDEA consists of "special education" and "related services." 20 U.S.C. § 1401(18).

The focus of the IDEA is on a "free and appropriate *public* education." Parents who unilaterally place their handicapped child in a private school despite the availability of a free appropriate public education at a public school may not demand special education and related services at the private school. *McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987), *aff'd*, 872 F.2d 153 (6th Cir. 1989); *Work v. McKenzie*, 661 F. Supp. 225 (D.D.C. 1987). The Goodalls can point to no case supporting their position.[1]

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[1] The only reference in the IDEA to private school children is the requirement that provision of special education and

(Continued on following page)

In *Work v. McKenzie*, 661 F. Supp. 225 (D.D.C. 1987), the parents of a handicapped child unilaterally placed the child in a private school although the public school offered to provide the special education needed by the child at a public school special education facility. The parents sought to have the public school pay for the child's transportation to and from the private school, arguing that such transportation was a related service which the public school was required to provide. The court held that the public school was not required to provide such transportation:

> Once [the public school] has designated an appropriate placement, the parents have a choice. They can place the child in the public or private school designated by the [public school] or they can place the child in a private school of their own choosing without approval by [the public school]. If they elect the latter, [the public school] is not required to pay for the school, however, if the private school lacks a special education component that the child requires, for example, speech therapy, [the public school] would then be required to furnish that service and to provide transportation where necessary. This does not mean, however, that [the public school] is required to transport [the child] to and from the [private school]. . . .

(Continued from previous page)

related services for handicapped children in private schools be consistent with their number and location. 20 U.S.C. § 1413(a)(4)(B). This provision would not be required if the states were required to provide special education and related services in every private school that a handicapped child chose to attend.

> [The public school] has provided [a total special education program] by *proposing* to place the child at [the public school]. The plaintiffs, as is their right, have rejected that proposal and chosen to place the child at the [private school]. They must therefore bear the entire expense and provide the transportation to and from the [private school]. 34 C.F.R. § 300.403.

Id. at 228-29 (emphasis added).

Work v. McKenzie makes clear that the public school's obligation is satisfied if it makes an appropriate special education program available to the child, and makes available to the child the related services associated with that program. Parents cannot, by unilaterally enrolling their child in a private school, impose a duty on public schools to pay for services that are available at public schools:

> This Court does not read the regulations as requiring [the public school] to take on the added burden of transporting the child where the public school has provided an appropriate alternative.

Id. at 229.

A similar demand was rejected in *McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987), *aff'd*, 872 F.2d 153 (6th Cir. 1989). In *McNair*, the parents also wanted transportation for their child to a private school although they had placed the child in a private school for their own personal reasons. The parents argued that the transportation was a related service to which they were entitled under the IDEA. In rejecting the plaintiffs' arguments, the court explained:

> The Regulations do not require the state to assume the cost of a private education for a handicapped child or the cost of services related to that private education which has been selected by the parents of the child for their own personal reasons, where the state has fulfilled its obligation by making its own appropriate program and related services available to those private school handicapped children.

676 F. Supp. at 1364.[2]

These cases make clear that the School Board is required to provide Matthew with special education and related services, if at all, only at the public schools. They make equally clear that, having placed Matthew in a private school for their own personal reasons, the Goodalls cannot demand that cued speech interpretation be provided to Matthew at a private school at public expense.

None of the federal regulations on which the Goodalls rely support their position. 34 C.F.R. § 300.403 provides:

> If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services *available* to the child as provided under §§ 300.450 – 300.460.

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[2] Contrary to the Goodalls' suggestion, the Sixth Circuit did not reject this holding, but rather found it unnecessary to consider this issue because it found the transportation was not designed to meet the unique needs of the child. 872 F.2d at 157.

(emphasis added). They also rely on 34 C.F.R. § 300.452 which provides:

> Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children[3] residing in the jurisdiction of the agency.

These regulations, however, only require the School Board to make the services *available* to Matthew *at the public school*:

> The question is whether the term "provide" means that the local educational agency need only make related services available to these children should they choose to take advantage of the state's offer of a free appropriate public education, or whether it means the agency must pay for a child's related services if the child chooses to attend a private school. . . . We find that § 300.452 can only be interpreted to mean that *a local school district need not pay for a child's related services when the child's parents choose to place her in a private school.*

McNair, 676 F. Supp. at 1372 (emphasis added).

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[3] The term "private school handicapped children" is defined as "handicapped children enrolled in private schools or facilities *other than* handicapped children covered under Regs. 300.400 – 300.402." 34 C.F.R. § 300.450 (emphasis added). The handicapped children covered under §§ 300.400 – 300.402 are "handicapped children who are or have been placed in or referred to a private school or facility by a public agency. . . ." 34 C.F.R. § 300.400. Matthew Goodall was placed in Fredericksburg Christian School by his parents rather than by a public agency. Consequently, he is a "private school handicapped child."

The Goodalls also misinterpret the Education Department General Administrative Regulations (EDGAR). The Goodalls point to 34 C.F.R. § 76.654, which requires that all students who are eligible to receive program benefits must receive comparable benefits. For example, if a public school were unable to provide a special education program needed by a handicapped child, then the public school could appropriately place the child in a private school which could provide that program. The public school would be required by this regulation to devote resources to that child's program comparable to the resources devoted to the programs of children in other special education programs in the public school. This regulation, however, presupposes that the child in private school is entitled to program benefits. It does not itself create the entitlement.

The Goodalls also point to 34 C.F.R. § 76.659, which provides:

> A subgrantee may use program funds to make public personnel available in other than public facilities – (a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and (b) If those benefits are not normally provided by the private school.

This regulation also presupposes that the child in private school is entitled to program benefits. Moreover, it sets limits on the use of program funds to students in private schools, and identifies the use of those funds for private school students in permissive terms ("[a] subgrantee *may* use program funds . . . "). It does not impose any obligation upon the School Board to expend public school funds for services at a private school.

Contrary to the Goodalls' arguments, the Regulations specifically limit the School Board's obligation to provide services to a private school student. 34 C.F.R. § 76.651(a)(1) provides:

> A subgrantee shall provide students enrolled in private schools with a genuine *opportunity* for equitable participation in accordance with the requirements in §§ 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(Emphasis added.) Thus, EDGAR requires only that Matthew receive an "opportunity" to participate in special education programs and related services under the IDEA. The School Board has fully complied with this requirement. The School Board has been and is ready to provide a cued speech interpreter to Matthew at a public school. Matthew's parents, however, have chosen to forego that opportunity by enrolling Matthew in Fredericksburg Christian School. The IDEA does not require the School Board to provide such services at whatever location Matthew or his parents may choose. *See Barnett v. Fairfax County School Bd.*, 721 F. Supp. 757, 761 (E.D. Va. 1989), *aff'd*, 927 F.2d 146 (4th Cir. 1991) ("[t]he school system is not required to duplicate the Cued Speech program for [a student] alone merely because there exists a . . . school which . . . he would rather attend."). Thus, the Court of Appeals correctly found that "by offering Matthew the services of a cued speech interpreter at Drew Middle School, the County is in full compliance with the requirements of the EHA and the regulations promulgated thereunder." (App. 28).

The Goodalls claim that statements by the U.S. Department of Education Office of Special Education Programs support their belief that Matthew is entitled to receive an interpreter at a private school. However, the opinions of the Office of Special Education Programs have consistently determined that non-public school children are entitled to only an *opportunity* to participate in public school programs.

Indeed, the Goodalls made an inquiry about this very case to the Department of Education. In the response reported at *Goodall*, 16 EHLR 1398 (1990), Dr. Judy Schrag, Director of the Office of Special Education Programs, stated:

> A limitation on the location at which some children with handicaps enrolled in private schools can be served, however, does not constitute a prohibition against the participation of these children in the special education programs carried out pursuant to the [IDEA]. . . .
>
> SEA's [state education agencies] and LEA's [local education agencies] do not necessarily have to provide services on the premises of private schools in order to meet their obligations under 20 U.S.C. § 1413(a)(4)(A). Rather, department regulations provide that students with handicaps enrolled in private schools must be provided by SEA's and LEA's "with a genuine opportunity for equitable participation" in the special education carried out by these agencies. The Department has long held that it is possible for SEA's and LEA's to provide students with handicaps enrolled in private schools with a genuine opportunity for equitable participation by serving them at a public school or neutral site.

Id. at 1399-1400 (citation and footnote omitted).

The Goodalls rely on *Aschenbrenner*, 1979 EHLR 211:110, but *Aschenbrenner* merely found that providing services on the premises of a non-public school is not *per se* impermissible. *See Aschenbrenner*, Inquiry 3, 1979 EHLR 211:111. This is significant, for example, where services are unavailable at the public school. Such, however, is not the case here. The Goodalls also point to the language of *Aschenbrenner* stating that "the 'least restrictive environment' provision would require that the services be provided to the non-public school child in his or her environment, if possible." *Aschenbrenner*, Inquiry 3, 1979 EHLR 211:111. The Goodalls, however, overlook the statement immediately following this language that "[s]ince Act 94-142 is directed at the local educational agency's obligation to *offer* the least restrictive environment, the law is not violated if the parents freely choose a non-public school environment which may not be the least restricted environment." *Aschenbrenner*, Inquiry 4, 1979 EHLR 211:111 (emphasis added). Thus, *Aschenbrenner* confirms that the School Board is only required to offer services to Matthew in the public schools.[4]

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[4] The Goodalls also cite *Los Altos School District*, 1985-86 EHLR 507:327 (Decision of Hearing Officer, California Office of Administrative Hearings). *Los Altos School District* was not the decision of a court, nor of a state agency. It was not even the decision of an administrative review officer. It was the decision of a first-level administrative hearing officer. *Los Altos School District*, moreover, is inapplicable to the Goodalls' case. *Los Altos School District* did not involve a parochial school and turned upon the fact that the services to be provided were "special education" (not "related services"). *See* 1985-86 EHLR 507:330. In contrast, the Goodalls seek "related services" in a parochial school. Consequently, reference to *Los Altos School District* here is irrelevant.

The Goodalls cite an administrative opinion from New York. In a more recent case, *Board of Educ. of the Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174, 527 N.E.2d 767, 531 N.Y.S.2d 889 (N.Y. 1988), the highest court of New York rejected claims similar to those of the Goodalls. The court held that there is neither a statutory nor a constitutional requirement that a public school provide private school handicapped children with services on the premises of the private schools they attend. The court explained:

> [The] contention that State and Federal statutes mandate provision of services to nonpublic school children on the premises of the [parochial] schools they normally attend requires little discussion. [T]here is no such statutory requirement. . . . This statutory claim . . . is therefore without merit.

531 N.Y.S.2d at 896. The Goodalls' authority does not support their position, but is directly to the contrary. The Court of Appeals decision was correct and the Petition should be denied.

II. THE PETITION SHOULD BE DENIED BECAUSE FEDERAL REGULATIONS PROHIBIT THE USE OF IDEA FUNDS FOR SERVICES AT A RELIGIOUS SCHOOL.

The Education Department General Administrative Regulations (EDGAR), provide:

> No state or subgrantee may use its grant or subgrant to pay for any of the following: Religious worship, instruction, or proselytization.

34 C.F.R. § 76.532(a)(1). There is no dispute in this case that Fredericksburg Christian School is a pervasively religious school. Matthew receives the teaching of Christian truth there and participates in a Bible class. The instruction Matthew would receive at Fredericksburg Christian School through a cued speech interpreter would have a religious component. Every word of religious instruction would be conveyed to Matthew through the cued speech interpreter. As found by the Hearing Officer, "When the interpreter is required for 100% attendance, he . . . is bound to interpret a certain percentage of religious teachings." (App. at 59). Section 76.532, therefore, expressly prohibits the School Board from providing a cued speech interpreter to Matthew Goodall at Fredericksburg Christian School.

III. THE PETITION SHOULD BE DENIED BECAUSE VIRGINIA LAW PROHIBITS THE USE OF PUBLIC FUNDS FOR SERVICES AT FREDERICKSBURG CHRISTIAN SCHOOL.

The IDEA expressly incorporates state educational standards. *See* 20 U.S.C. § 1413(a)(4)(B); 34 C.F.R. § 300.401(a)(3). "When a handicapped child is educated at a private school under the EHA, the State has an obligation to ensure that the school meets applicable State educational standards." *Schimmel by Schimmel v. Spillane*, 819 F.2d 477, 484 (4th Cir. 1987). The state standards for Virginia are codified at Va. Code §§ 22.1-213 through -222 and the regulations promulgated thereunder. The Virginia standards have been approved by the United States Department of Education. *Id.*

Virginia educational standards provide for special education only in nonsectarian private schools "approved by the Board of Education."

> A school board may provide special education for handicapped children either directly with its own facilities and personnel or under contract with another school division or divisions or any other public or private *nonsectarian* school, agency or institution *approved by the Board of Education*.

Va. Code § 22.1-216 (emphasis added). *See Schimmel*, 819 F.2d at 484. Because Fredericksburg Christian School has not been approved by the Board of Education (App. at 11), the School Board is neither required nor permitted to provide special education or related services at public expense at Fredericksburg Christian School.

Article VIII, § 10 of the Virginia Constitution prohibits public appropriations to sectarian schools. Va. Code § 22.1-216, § 22.1-218 and § 22.1-220 authorize aid or the provision of special education and related services only in "nonsectarian" schools, and therefore prohibit such assistance in sectarian schools.[5] *See Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982); *School Bd. v. Giannoutsos*, 238 Va. 144, 147, 380 S.E.2d 647, 649 (1989) ("where a statute creates a right and provides a remedy for the vindication of that right, then that remedy

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[5] Under the "Dillon Rule," local government bodies in Virginia have only those powers expressly granted by the legislature or conferred by necessary implication from express powers. *Board of Supervisors v. Horne*, 216 Va. 113, 215 S.E.2d 453 (1975).

is exclusive unless the statute says otherwise"); *Walker v. Temple*, 130 Va. 567, 571, 107 S.E. 720, 721 (1921).

There is no dispute in this case that Fredericksburg Christian School is a sectarian, religious school, and thus the School Board is prohibited by law from providing special education or related services there.[6]

IV. THE PETITION SHOULD BE DENIED BECAUSE THE REFUSAL TO SUBSIDIZE THE GOODALLS' RELIGIOUS BELIEFS DOES NOT RAISE A FIRST AMENDMENT QUESTION.

Because there is no requirement that the School Board provide special education and related services in a private school, secular or non-secular, when the student's parents have voluntarily placed him in that school, the Court of Appeals could have affirmed the decision of the District Court for this reason alone. If a case can be resolved on the basis of a non-constitutional issue, then

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[6] The Goodalls argue that Va. Code § 22.1-219 effectively repeals Va. Code §§ 22.1-216 and 220. Their argument ignores basic principles of statutory construction. First, as discussed above, nothing in the IDEA or federal regulations requires that special education or related services be provided in a private school, much less a religious school. Second, a statute should be interpreted in a way that gives effect to every provision of the statute. *Posey v. Commonwealth*, 123 Va. 551, 553, 96 S.E. 771 (1918). Section 219 simply makes it clear that a child should not be denied access to other federal or state programs simply because he is receiving a "free appropriate public education" under the IDEA and state statutes. The interpretation sought by the Goodalls would render meaningless the "nonsectarian" qualification in Va. Code §§ 22.1-216, 218 and 220, as well as the Constitution of Virginia.

the court must decide it on that non-constitutional basis. *See Communist Party of the United States v. Subversive Activities Control Bd.*, 351 U.S. 115, 122 (1956) ("the case must be decided on a non-constitutional issue, if the record calls for it, without reaching constitutional problems"); *see generally* 16 Am. Jur. 2d *Constitutional Law* §§ 160, 172 (1979).

The School Board's refusal to provide a cued speech interpreter does not prevent the Goodalls from exercising their religious beliefs. Instead, the School Board's decision merely "operates so as to make the practice of their religious beliefs more expensive" because they do not have the benefit of a government subsidy for the special education. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). However, this is a burden they have placed upon themselves, just as they have undertaken the burden of paying private school tuition. The School Board has done nothing to burden the Goodall's freedom of religion. They are entirely free to follow any religious belief they desire. They simply have no affirmative constitutional entitlement to have their religious beliefs subsidized by state or federal funds. Thus, the School Board's refusal to provide a cued speech interpreter to Matthew at public expense has inflicted no cognizable injury upon plaintiffs.

There is a basic difference between the use of expressive activity or a religious belief as a basis for discriminatorily imposing a direct regulatory burden, and the use of such content-related distinctions as a basis for determining whether to subsidize or support a particular group or activity.

For example, in *Regan v. Taxation With Representation* ("TWR"), 461 U.S. 540 (1983), this Court held that the federal government may provide a tax exemption solely for groups that lobby on behalf of veterans' interests, while denying such an exemption to other organizations devoted to activities protected by the First Amendment. The Court rejected the notion that "strict scrutiny applies whenever Congress subsidizes some speech, but not all speech." *Id.* at 548. Rather, in the benefit context, the only inquiry is whether the distinction has a rational basis; it was "not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations." *Id.* at 550. *See also Maher v. Roe*, 432 U.S. 464, 475 (1977); and *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

This Court has "held in several contexts that a [government's] decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *TWR*, 461 U.S. at 549. Most recently, in *Rust v. Sullivan*, ___ U.S. ___, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991), this Court reaffirmed that "the government has no constitutional duty to subsidize an activity merely because it is constitutionally protected, and may validly choose to allocate public funds for medical services relating to childbirth, but not to abortion. That allocation places no governmental obstacle in the path of the woman wishing to terminate her pregnancy and leaves her with the same choices as if the government had chosen not to fund family planning services at all." *Id.* 111 S. Ct. at 1763-64 [citation omitted].

It is thus well settled that a government's refusal to subsidize is not a penalty or infringement of a constitutional right. The Constitution "does not confer an entitlement to such funds as may be necessary to realize all the advantages of [a constitutional] freedom." *Harris v. McRae*, 448 U.S. 297 at 318 (1980). Accordingly, the Court has repeatedly rejected the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State." *Cammarano v. United States*, 358 U.S 498, 515 (1959) (Douglas, J., concurring). Therefore, the decision by the State of Virginia to provide IDEA funds only to nonsectarian schools does not implicate a First Amendment right. Similarly, a refusal by Stafford County School Board to provide benefits to religious schools would not implicate a First Amendment right.[7]

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[7] The cases cited by the Goodalls on this point are inapposite. In those cases, the government attempted to deny a benefit to which the plaintiffs were otherwise entitled solely on the basis of some unconnected speech or activity. Thus, for example, if the government were to withhold social security benefits to persons who sent their children to private parochial schools it would be an impermissible burden on a First Amendment right, as there is no connection between the school decision and the social security benefits. However, to refuse to provide payments related to these students' education in a private parochial school because of the religious nature of the school is not an unconstitutional burden, but is rather a refusal to subsidize based upon a legitimate relationship between the funding decision and the benefit at issue.

V. THE PETITION SHOULD BE DENIED BECAUSE THE FREE EXERCISE CLAUSE DOES NOT REQUIRE THE SCHOOL BOARD TO ASSIST MATTHEW GOODALL IN HIS RELIGIOUS STUDIES.

In any event, the alleged burden on the Goodalls' exercise of their religious belief is completely justified by the School Board's compelling interest in avoiding violation of the Establishment Clause. *See Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990); *Langlotz v. Picciano*, 683 F. Supp. 1041, 1048, 1049 (E.D. Va. 1988), *aff'd*, 905 F.2d 1530 (4th Cir. 1990) ("Plaintiff's free exercise rights . . . , if any, are clearly outweighed by the [state's] compelling interests in avoiding Establishment Clause violations . . . "; "[the state government institution] has a duty to ensure that its employees, in their roles as state employees, do not encourage or promote [religion]").[8] As explained below, the School Board would violate the Establishment Clause if it provided a cued speech interpreter to Matthew at Fredericksburg Christian School. It is well recognized that there is a compelling state interest in avoiding violation of the Establishment Clause of the First Amendment:

> The Free Exercise Clause of the First Amendment . . . does not prohibit a government from forcing a choice between receipt of a public benefit and pursuit of a religious belief if it can show a compelling reason for doing so. Avoiding a violation of the Establishment Clause that would otherwise result from an apparent

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[8] The School Board's refusal to provide the interpreter is also justified by a compelling interest in not violating the establishment clause of Va. Const. Art. I, § 16.

> endorsement of the tenets of a particular faith is ample reason for compelling that choice.

Parents' Association of P.S. 16 v. Quinones, 803 F.2d 1235, 1241-42 (2d Cir. 1986) (citations omitted).

VI. THE PETITION SHOULD BE DENIED BECAUSE THE SCHOOL BOARD WOULD VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT IF IT PROVIDED A CUED SPEECH INTERPRETER AT FREDERICKSBURG CHRISTIAN SCHOOL.

If a public school system provides personnel in a religious school, particularly where the state employee will provide instructional assistance in the religious school's classes, including religion classes, there is a clear violation of the First Amendment of the U.S. Constitution. The Goodalls can point to no court case in which a public school has been permitted to provide personnel to a religious school.

The Establishment Clause of the First Amendment prohibits governmental "establishment" of religion. More particularly, it forbids government "sponsorship, financial support, and active involvement . . . in religious activity." *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 381 (1985).

This Court has established a three-part test for establishment of religion. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). Government action is unconstitutional if it fails any part of this test. First, the government action must have a secular purpose. Second, the action must not have the primary effect of advancing religion. Third, it must not create excessive entanglement between church and

state. *Id.*, 403 U.S. at 612-13. This three-part test is especially applicable to government action regarding the education of children. *See Grand Rapids*, 473 U.S. at 373, 384.

The government action sought by the Goodalls would violate the second and third parts of the *Lemon* test. It would impermissibly promote religion, and would excessively entangle church and state.

A. Providing a Publicly Sponsored Cued Speech Interpreter to Matthew Goodall at Fredericksburg Christian School Would Impermissibly Promote Religion.

Publicly funded programs related to education may impermissibly advance religion in three ways:

> First, the [personnel] participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs.
>
> Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting – at least in the eyes of impressionable youngsters – the powers of government to the support of the religious denomination operating the school.
>
> Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.

Grand Rapids, 473 U.S. at 385. The government assistance sought by the Goodalls would impermissibly advance religion in all these ways.

First, a cued speech interpreter at Fredericksburg Christian School would participate in the inculcation of religious tenets or beliefs. Fredericksburg Christian School is a religious school that teaches Bible study and incorporates Christian teachings into its classes. The school's academic objective is "To help students appreciate God's Word as their most basic 'life textbook.' " The interpreter would communicate to Matthew all the religious messages propounded by Matthew's teachers. Therefore, the School Board would unconstitutionally finance religious indoctrination. *See Meek v. Pittenger*, 421 U.S. 349, 370-72 (1975); *Grand Rapids*, 473 U.S. at 386-88.

Second, a publicly funded cued speech interpreter working at Fredericksburg Christian School would create student perceptions of a symbolic link between government and religion. Students would see the state providing help in communicating religious messages to Matthew, and would perceive that the state endorses Fredericksburg Christian School's religious teachings. "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Grand Rapids*, 473 U.S. at 389-90. The creation of this perception would violate the Establishment Clause.

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any – or all – religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement . . . of religion, a core purpose of the Establishment Clause is violated.

Id. at 389.

Third, the School Board would in effect provide a "direct and substantial" subsidy to the primary religious mission of Fredericksburg Christian School by providing a cued speech interpreter at that school. *See Grand Rapids*, 473 U.S. at 392-97. "Even though earmarked for secular purposes, when [state aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission, state aid has the impermissible primary effect of advancing religion." *Meek*, 421 U.S. at 365-66; *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988) (government aid flowing to a pervasively sectarian school has the primary effect of advancing religion); *Hunt v. McNair*, 413 U.S. 734, 743 (1973) ("[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . "). Moreover, since the Fredericksburg Christian School is a religious school, this effect would be impermissible even if the subsidy were "indirect and incidental." *See Grand Rapids*, 473 U.S. at 394 n.12.

The United States District Court for Arizona has recently held that sign language interpretation demanded for James Zobrest, a student at Salpointe Catholic High School, would impermissibly advance religion in violation of the Establishment Clause. *See Zobrest v. Catalina Foothills*, 1988-89 EHLR 441:564 (D. Ariz., July 19, 1989).

B. Providing a Publicly Sponsored Cued Speech Interpreter to Matthew Goodall at Fredericksburg Christian School Would Involve Excessive Entanglement Between Church and State.

If state aid is provided to personnel in a religious school, then "[t]he State must be *certain*, given the Religion Clauses, that subsidized [personnel] do not inculcate religion. . . . " *Lemon*, 403 U.S. at 619 (emphasis added). "[A] diminished probability of impermissible conduct is not sufficient. . . . " *Meek*, 421 U.S. at 371.

To insure that aid does not promote religion, however, the state generally must impermissibly entangle itself in the affairs of the religious school. This is particularly true where, as here, the aid is in the form of personnel. For example, in *Lemon* this Court observed:

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that [the restrictions] are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Lemon, 403 U.S. at 619. Similarly, in *Meek*, the Court found:

> To be certain that [personnel] remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of [the personnel] and then engage in some

> form of continuing surveillance to ensure that those restrictions were being followed.

Meek, 421 U.S. at 372. And in *Aguilar v. Felton* the Court found:

> The critical elements of the entanglement proscribed in *Lemon* and *Meek* are . . . present in this case. First, . . . the aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of [personnel], ongoing inspection is required to ensure the absence of a religious message.

Aguilar v. Felton, 473 U.S. 402, 412 (1985).

The "critical elements" identified in *Aguilar* are also presented in the instant case. Publicly funded assistance would be provided to Matthew in a sectarian environment, Fredericksburg Christian School. Ongoing monitoring of the cued speech interpreter's communication to Matthew would be necessary. The state would therefore be required to excessively entangle itself in Fredericksburg Christian School. That state presence would, in fact, be required under state regulations. Those regulations provide that special education and related services must be provided "under public supervision and direction." Special Ed. Regs. at p. 28. Those regulations further provide: "Each LEA providing services to children enrolled in private schools shall maintain continuing administrative control and direction over those services." *Id.* at p. 44. In addition, public employees of the School Board would be required to visit Matthew's classes to monitor the interpreter's performance, just as they monitor the performance of its other teachers and aids.

As was true of the services in *Aguilar*, providing an interpreter to Matthew at a religious school "would require a permanent and pervasive state presence" there. *Aguilar*, 473 U.S. at 413. The necessary monitoring by public authorities in Fredericksburg Christian School would be pervasive and would infringe "precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." *Id.*[9]

CONCLUSION

The issues presented by the Petitioners involve neither a substantial federal question nor a split among the circuits. Therefore, Respondent prays that Certiorari be denied.

Respectfully submitted,

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[9] This is particularly true after the enactment of the Civil Rights Restoration Act of 1987, P.L. 100-259, 20 U.S.C. § 1681, *et seq.*, which would make Fredericksburg Christian School subject to extensive federal regulations upon the receipt of federal/state funds.